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Queen-Empress v. *Khushali Ram*, (1) laid down no hard and fast rule upon this point. The learned Chief Justice, who decided that case, held that if a jury required evidence, evidence should be produced before it, and that in that case it was for the Magistrate to show by evidence that the obstruction referred to was an obstruction of a public way or in a public place. So far as I can see, Chapter X does not lay down any rules as to the procedure that must be adopted by a jury. The questions which are now raised are questions which, it appears to me, should have been raised by or on behalf of the firm long ago in the case.

It has been held by a learned Judge of this Court in *In the matter of the petition of Lachman* (2) that a person who applies for a jury is bound by the verdict of the jury and cannot raise such a plea as that the obstruction was caused in the exercise of a *bonâ fide* claim of right. So far as I can judge from the record, the firm of Ram Karan Ram Bilas had long and sufficient notice of the action which the Divisional Magistrate intended to take, and I am not prepared in revision to interfere. I dismiss the application.

APPELLATE CIVIL.

1908
May 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

PABITRA KUNWAR (PLAINTIFF) *v.* THE MAHARAJA OF BENARES (DEFENDANT). *

Procedure—Refusal of Court of first instance to examine all the plaintiff's witnesses—Appeal by defendant decreed—Remand.

Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower appellate Court took a different view of the plaintiff's evidence and dismissed the suit. *Held* that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. *Kifayat-ullah Mondol* v. *Sakina Bibi* (3) and *Kalyani Prasad* v. *Bishnath* (4) referred to.

IN a suit pending in the Court of the Munsif of Benares, owing to the failure of the defendant to comply with an order of

* Second Appeal No. 685 of 1907, from a decree of G. A. Paterson, District Judge of Benares, dated the 7th of March 1907, reversing a decree of Hira Lal Singh, Munsif of Benares, dated the 21st of December 1906.

(1) (1895) I. L. R., 18 All., 158. (3) (1897) 11 C. W. N., p. xcii.
(2) Weekly Notes, 1900, p. 180. (4) Weekly Notes, 1905, p. 266.

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the Court his defence was struck out. The suit was proceeded with *ex parte*. The plaintiff had produced part of the evidence upon which she relied in support of her claim, when the Munsif intimated that, inasmuch as the suit was undefended, there was sufficient evidence already on the record and passed a decree in favour of the plaintiff. The defendant appealed to the District Judge, who, being of opinion that the evidence recorded was not sufficient to support the plaintiff's claim, allowed the appeal and dismissed the suit, without giving the plaintiff an opportunity, which was asked for, of producing the rest of her evidence. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Surendra Nath Sen*), for the appellant.

Munshi *Gokul Prasad*, Babu *Sital Prasad Ghosh* and Babu *Satya Chandra Mukerji*, for the respondent.

STANLEY, C. J., and KARAMAT HUSAIN, J.—We think that the learned District Judge was wrong in dismissing the plaintiff's suit without first giving her an opportunity of examining all the witnesses whom she was prepared to examine before the Court of first instance. It appears that by reason of default of the defendant in complying with the order of the Court his defence was struck out and the suit was heard *ex parte*. Before the plaintiff had examined all her witnesses the Munsif intimated that, inasmuch as the case was undefended, there was sufficient evidence already on the record, and passed a decree in favour of the plaintiff. On appeal the learned District Judge was not satisfied that the evidence on the record was sufficient to establish the plaintiff's claim. A representation was made to him that all the evidence which was available had not been produced by the plaintiff before the Munsif. In view of this we think that the learned District Judge ought not to have dismissed the plaintiff's suit, but ought to have remanded the suit to the Court of first instance with directions that it be retried, an opportunity being given to the plaintiff of examining her witnesses and adducing all her evidence. This was the course which was adopted in *Kifayat-ullah Mondol* v. *Sakina Bibi* (1). It is supported by the decision of a Bench of

(1) (1897) 11 C. W. N., p. xcii.

this Court in *Kalyani Prasad* v. *Bishnath* (1). We therefore allow the appeal. We set aside the decrees of both the lower Courts, and we remand the suit through the lower appellate Court to the Court of first instance with directions that it be reinstated on the file of pending suits in its original number and be disposed of on the merits. Costs here and hitherto will abide the event.

Appeal decreed and Cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

1908. *May* 8.

RAM ANANT SINGH AND ANOTHER (PLAINTIFFS) v. SHANKAR SINGH (DEFENDANT).*

Landlord and tenant—Concurrent leases—Landlord entitled to recover rent only as against second lessee.

Held that where a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor after the execution of the second lease can recover rent only from the second and not from the first lessee. *Harmer* v. *Bean* (2) followed.

THE plaintiffs in this case were owners of a share in a village called Chingauri in the Mirzapur district. On the 16th of June 1900, they executed a lease of this property in favour of one Raghunath Singh for a term extending from 1308 to 1314 Fasli at an annual rent of Rs. 395. Subsequently, namely, on the 12th of April 1904, the plaintiffs executed another lease of the same property at the same rent, but extending from 1312 to 1320 Fasli, in favour of one Shankar Singh. Under this lease Shankar Singh was authorized to realize the rent from the first lessee Raghunath Singh. Shankar Singh failed to pay the rent due from him for 1312-1313 Fasli and the lessors accordingly sued for its recovery. The Court of first instance (Assistant Collector) gave the plaintiffs a decree. On appeal, however, the District Judge reversed this decree and dismissed the plaintiffs' suits. The plaintiffs thereupon appealed to the High Court.

*Second Appeal No. 556 of 1907, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 5th of February 1907, reversing a decree of Kunwar Jagdish Prasad, Assistant Collector 1st class of Mirzapur, dated the 17th of November 1906.

(1) Weekly Notes, 1905, p. 266. (2) (1853) 3 C. and K., 307.

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RAM ANANT SINGH v. SHANKAR SINGH.

Babu *Durga Charan Banerji* and Munshi *Haribans Sahai*, for the appellants.

Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J., and KARAMAT HUSAIN, J.—The facts of this case are these. The plaintiffs are the owners of a share of a village called Chingauri in the district of Mirzapur. On the 16th of June, 1900, they executed a lease of this property in favour of the defendant Raghunath Singh for a term extending from 1308 to 1314 Fasli at an annual rent of Rs. 395. Subsequently, on the 12th of April, 1904, the plaintiffs executed another lease of the same property in favour of the defendant Shankar Singh for a term extending from 1312 to 1320 Fasli at the same rent, namely, Rs. 395. Under this lease Shankar Singh was authorized to realise the rent from the defendant Raghunath Singh. This was what is known as a concurrent lease. Shankar Singh failed to pay the rent for the years 1312—1313 Fasli; and hence the suit was brought out of which this appeal has arisen. The Court of first instance decreed the plaintiffs' claim, but upon appeal the learned District Judge reversed the decision of the Court below and dismissed the plaintiffs' suit on the ground that as long as the lease of 1900 subsists the plaintiffs have no right to maintain a suit for rent against Shankar Singh. He says in his judgment:—"As Raghunath Singh's lease was not cancelled, and as he was not ejected, he remained in possession as thekadar in 1312 and 1313 Fasli, and Shankar Singh was not in possession in those years. I therefore do not see how Shankar Singh can be held responsible for the rent for 1312 and 1313 Fasli." In this view the learned District Judge was in error. The lease of 1904 operated as an assignment of the landlord's interest during the term of the earlier lease of 1900, and thereafter as a lease for the residue of the term granted by it. As assignee of the landlord Shankar Singh was entitled to collect the rent from Raghunath Singh. In the Law of Landlord and Tenant by Mr. Woodfall we find the law thus stated:—"A concurrent lease is one granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises to another person. If under seal, it operates as an assignment of part of the reversion during the continuance of such previous lease, and from henceforth as a lease in possession during

the residue of the term therein expressed to be granted. It entitles the lessee as assignee of part of the reversion to the rent reserved in the previous lease and to the benefit of the covenants therein contained which are to be respectively paid and performed during the then residue of the term granted by the first lease and the continuance of the concurrent lease" (17th Ed., 235). In support of this statement the learned author quotes the decision of a very eminent English Judge, Baron Parke. In the case of *Harmer* v. *Bean* (1) the learned Baron held under very similar circumstances that the operation of a concurrent lease of the kind was to transfer part of the reversion of the landlord to the lessee, and that the landlord after the execution of such concurrent lease could not recover as against the first lessee any rent due after the execution of the concurrent lease. The facts in that case were these: the defendant rented a house from the plaintiff at a rent of £20 quarterly; afterwards the lessor granted a lease by deed to a third party of the house in question and other property for 21 years. It was held that the landlord could not recover the rent due under the first lease after the execution of the second lease. For these reasons we think the learned District Judge was in error, and we therefore, allowing this appeal, set aside his decree and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

(1) (1853) 3 C. and K., 307.

1908.
May 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

RAM LAL (DEFENDANT) *v.* BAHADUR ALI (PLAINTIFF) AND ISMAIL KHAN, (DEFENDANT).*

Pre-emption—Wajib-ul-arz—Construction of documents—Muhammadan law.

The pre-emptive clauses of a wajib-ul-arz contained the following provision:—"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners of the *khalsa* and *milks* the following custom of pre-emption obtains." The *khalsa* subsequently came to have more owners than one. *Held* that no right of pre-emption was given by this wajib-ul-arz to the owners of the *khalsa inter se*, but that a sale of a share in the *khalsa* was subject to the Muhammadan law of pre-emption, and this irrespective of the fact that the vendee was a Hindu. *Gobind Dayal* v. *Inayatullah* (1), *Qurban Husain* v. *Chote* (2) and *Amir Hasan* v. *Rahim Bakhsh* (3) referred to.

THE facts of this case are as follows:—

ONE Ismail Khan on the 9th of December 1900, sold a share in the *khalsa* land of Bazidpur to Ram Lal. Bahadur Ali Khan brought a suit for pre-emption under the Muhammadan law, presumably under the Hanafi school. The vendee raised various defences. The Court of first instance (Subordinate Judge of Moradabad), finding that the vendee Ram Lal was entitled to pre-empt under the wajib-ul-arz and that Bahadur Ali was entitled to pre-empt under the Muhammadan law, gave the latter a decree for half the property in suit on payment of half the price for which it had been sold. Both parties appealed. The District Judge, coming to the conclusion that the custom of pre-emption recorded in the wajib-ul-arz superseded the rules of the Muhammadan law, and finding that Bahadur Ali was a near relation of the vendor, gave Bahadur Ali a decree for all the property in suit and dismissed the appeal of Ram Lal. The vendee Ram Lal thereupon appealed to the High Court.

Mr. *G. W. Dillon*, for the appellant.

Mr. *Abdul Raoof*, for the respondent.

KARAMAT HUSAIN, J.—The facts out of which this second appeal has arisen are as follows:—

One Ismail Khan on the 9th of December 1900, sold a share in the *khalsa* land of Bazidpur to Ram Lal. Bahadur Ali Khan

* Second Appeal No. 1260 of 1906, from a decree of D. R. Lyle, District Judge of Moradabad, dated the 6th of August 1906, modifying a decree of Mohan Lal, Subordinate Judge of Moradabad, dated the 23rd of September 1905.

(1) (1885) I. L. R., 7 All., 775. (2) (1899) I. L. R., 22 All., 102.
(3) (1897) I. L. R., 19 All., 466.

brought a suit for pre-emption under the Muhammadan law, presumably under the Hanafi school. The vendee raised various defences. The Court of first instance, finding that the vendee Ram Lal was entitled to pre-empt under the wajib-ul-arz and that Bahadur Ali was entitled to pre-empt under the Muhammadan law, gave the latter a decree for half the property in suit on payment of half the price for which it had been sold. Both parties appealed. The learned District Judge coming to the conclusion that the custom of pre-emption recorded in the wajib-ul-arz superseded the rules of the Muhammadan law, and finding that Bahadur Ali was a near relation of the vendor, gave Bahadur Ali a decree for all the property in suit and dismissed the appeal of Ram Lal. Ram Lal has preferred this second appeal. The grounds of appeal are :—

(1) The interpretation put upon the wajib-ul-arz is wrong.

(2) The words in the wajib-ul-arz relate to propinquity in space and not propinquity of relationship.

(3) The claim being based on the Muhammadan law, a decree under the wajib-ul-arz could not be passed.

The following facts have been found by the lower appellate Court :—(1) Bahadur Ali is a co-sharer in the *khalsa* ; (2) Ram Lal is also a co-sharer in the *khalsa*. The point on which the decision of this appeal turns is the interpretation of the wajib-ul-arz. The material portion of it may be rendered as follows :—

"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa* ; but among the owners (lit. owner) of the *khalsa* and *milks* the following custom of pre-emption obtains."

On the basis of the above extract from the wajib-ul-arz it is urged for the appellant that the wajib-ul-arz gives no right of pre-emption to the co-sharers in the *khalsa inter se*, but that there is a right of pre-emption between the owners of the *khalsa* and the owners of the *milks* in the sense that if a share in the *khalsa* is sold the owner of the *milk* is entitled to pre-empt. Whatever may be the correct meaning of the last portion of this peculiarly worded clause in the wajib-ul-arz, I can safely say that according to the plain meaning of the first part of the clause, the *khalsa* land is not subject to a claim for pre-emption under the

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wajib-ul-arz. Such being the case, the wajib-ul-arz has no application to the sale of the *khalsa* land, and a suit to pre-empt it can only be instituted under the Muhammadan law.

This leads me to determine the right of the pre-emptor and the vendee under the Hanafi school of Muhammadan law. The property sold belonged to a Muhammadan, and was therefore subject to pre-emption by those who were entitled to pre-empt under that law. The fact that it was purchased by a Hindu makes no difference. He purchased it subject to the right of pre-emption by the plaintiff. See *Gobind Dyal* v. *Inayat ul-lah* (1).

It might, however, be contended that Ram Lal being a Hindu has not a right to pre-empt, although he is a co-sharer in the *khalsa*, but there is no force in this contention. "The principle of reciprocity," as remarked by Aikman, J., in *Qurban Husain* v. *Chote*, (2) "lies at the root of the law of pre-emption" and "according to the Hanafi law it is not necessary that the pre-emptor should be of the same religion as the vendor."

The conclusions at which I thus arrive are that :—

(1) The *khalsa* land in Bazidpur is not subject to the right of pre-emption under the wajib-ul-arz.

(2) The case before us is to be governed by Hanafi law.

(3) Bahadur Ali and Ram Lal both have equal rights of pre-emption in respect of the *khalsa* land.

Following, therefore, *Amir Hasan* v. *Rahim Bakhsh* (3), I set aside the decree of the lower appellate Court and give Bahadur Ali a decree for possession of half of the property in dispute on condition that the plaintiff shall deposit in Court within two months hence the sum of Rs. 734 which is half the purchase money. Ram Lal defendant will pay the costs incurred by the plaintiff in all Courts : on default his suit shall stand dismissed with costs in all Courts.

STANLEY, C.J.—I concur in the views expressed by my learned brother. The wajib-ul-arz which we have to interpret has a most novel provision as to pre-emption, and it is difficult to say what was in the minds of the parties when they agreed to be bound by it. But upon the whole I am disposed to think that the view

(1) (1885) I. L. R., 7 All., 775 (2) (1899) I. L. R. 22 All., 102; at p. 104.
(3) (1897) I. L. R., 19 All., 466.

which has been adopted by my learned colleague is correct. I therefore concur in the proposed order.

BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be set aside and that a decree for possession of half of the property in dispute be passed in favour of Bahadur Ali, on the condition that he deposit in Court within two months from this date a sum of Rs. 734. We give Bahadur Ali the costs of this appeal in all Courts in the event of the payment of the said sum within the time aforesaid. In default of payment his suit will stand dismissed with costs in all Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908
May 14.

JAGARDEO SINGH (PLAINTIFF) *v.* PHULJHARI AND ANOTHER (DEFENDANTS).*

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 91—*Limitation—Suit for cancellation of a deed—Suit for a declaration that hct transaction evidenced by the deed was fictitious.*

A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of article 91 of the second schedule to the Indian Limitation Act. *Sham Lall Mitra* v. *Amarendro Nath Bose* (1) and *Petherpermal Chetty* v. *Muniandy Servay* (2) referred to.

THE facts of this case are as follows :—

The plaintiff came into Court alleging that he and his nephew Ramdeo had executed a sale-deed of certain zamindari property in favour of the defendant Musammat Phuljhari on the 27th of June 1899 ; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment ; that a deed was drawn up and signed by her, but she refused to have it registered, and that an application for the registration of the deed made by the plaintiff to the District Registrar was refused. The plaintiff accordingly prayed for a decree directing the registration of the deed of relinquishment. This part of the

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*Second Appeal No. 859 of 1907, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 10th of April 1907, reversing a decree of Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 6th of September 1905.

(1) (1895) I. L. R., 23 Calc., 460. (2) (1908) 12 C. W. N., 562.

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claim was subsequently withdrawn. He further prayed that it may be declared that the sale of the 27th of June 1899 was a fictitious transaction and without consideration. In the alternative he prayed that, if the sale transaction was held to be genuine, Rs. 800, the amount of consideration mentioned in the sale deed, should be awarded to him against the defendant. The Court of first instance, (Subordinate Judge of Jaunpur), held that the sale was a fictitious transaction and dismissed the claim. On appeal the District Judge came to the conclusion that the suit was time-barred, having been brought after three years from the date of its execution, and dismissed it. The plaintiff appealed to the High Court.

Munshi *Kalindi Prasad*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

STANLEY, C.J., and BANERJI, J.—The Court below has dismissed the suit of the plaintiff appellant on the ground that it is barred by limitation under article 91 of the second schedule to the Limitation Act. The only question for determination in this appeal is whether that article governs the suit. The plaintiff's case was that he and his nephew Ramdeo executed a sale deed of certain zamindari property in favour of the defendant Musammat Phuljhari on the 27th of June 1899; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment; that a deed was drawn up and signed by her, but she refused to have it registered, and that an application for the registration of the deed made by the plaintiff to the District Registrar was refused. The plaintiff accordingly brought the present suit for a decree directing the registration of the deed of relinquishment. This part of the claim was subsequently withdrawn. He further prayed that it may be declared that the sale of the 27th of June 1899 is a fictitious transaction and without consideration. In the alternative he prayed that, if the sale transaction was held to be genuine, Rs. 800, the amount of consideration mentioned in the sale deed, should be awarded to him against the defendant. The Court of first instance held that the sale was a fictitious transaction and dismissed the claim. On appeal the learned Judge came to the conclusion that the

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suit was time-barred, having been brought after three years from the date of its execution. This view of the learned Judge appears to us to be erroneous. The claim was not to set aside the sale deed, but for a declaration that from its very inception it was a sham transaction. If this was so, there was no necessity for the plaintiff to have the deed set aside, and therefore article 91 of the second schedule to the Limitation Act had no application. This was so held by the Calcutta High Court in *Sham Lall Mitra* v. *Amarendro Nath Bose* (1). We may also refer to the recent ruling of their Lordships of the Privy Council in the case of *T. P. Petherpermal Chetty* v. *R. Muniandy Servay* (2). If article 91 was applicable, the learned Judge should also have determined when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. This he has not done. As the suit was dismissed on a preliminary ground, and in our opinion that ground is untenable, we allow the appeal, set aside the decree of the Court below and remand the case to that Court under section 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of it according to law on the merits. The appellant will have his costs of this appeal. Other costs will follow the event.

Appeal decreed and Cause remanded.

APPELLATE CRIMINAL.

1908
May 15.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

EMPEROR *v.* LACHMI NARAIN.*

Act No. XII of 1896 (*Excise Act*), *sections* 44 (2), 48 *and* 57—*Definition*—*Excise Officer*—*Jurisdiction.*

Held that a head constable is an Excise Officer within the meaning of section 57 of the Excise Act, 1896. *Queen-Empress* v. *Makunda* (3) followed.

On the 11th of September, 1907, one Lachmi Narain was arrested in the Bisraint Bazar, Muttra, by a head constable and a constable on suspicion of having illicit charas in his possession.

* Criminal Appeal No. 276 of 1908, from an order of H. W. Lyle, Sessions Judge of Agra, dated the 9th of November 1907.

(1) (1895) I. L. R., 23 Calc., 460. (2) (1908) 12 C. W. N., 562.
(3) (1897) I. L. R., 20 All., 70.